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Supreme Court, U.S.
FILED
SEP 19 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-44

In The
Supreme Court of the United States
October Term, 1987

IN THE MATTER OF:
TULANE HOTEL INVESTORS
LIMITED PARTNERSHIP
a Louisiana Partnership,

Petitioner,

v.

FIRST FINANCIAL BANK, FSB,
a Federal Savings Bank, and
JEAN HEBERT TURNER, TRUSTEE,
a Trustee in Bankruptcy under Chapter 7,

Respondents.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Counsel of Record

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STATUTES

11 U.S.C. 365(d)(4) 1, 3

I. FACTS

On August 7, 1987 upon Motion for Payment of Administrative Claim filed in *In re: LaStrada Ristorante, Inc.*, No. 87-02611-BKC-THK (Bankr. E.D. La filed June 15, 1987) the debtor was ordered to pay $4,400.00 "rent for the month of July, 1987." The order was signed by United States Bankruptcy Judge T. H. Kingsmill, Jr. See Appendix A for full text of this order.

On August 18, 1987 in said *In re: LaStrada,* Bobbie McGee's Inc. (hereinafter "McGee's"), "landlord of an unexpired lease of non-residential real property under which the debtor is lessee," filed a Motion to Surrender Leasehold Premises to Landlord wherein McGee's stated that the debtor failed to comply with the provisions of 11 U.S.C. 365(d)(4) in that 60 days had elapsed since the granting of relief under 11 U.S.C. 1101 *et seq.* and that debtor had failed to accept or reject the lease. McGee's claimed the lease was deemed rejected by operation of 11 U.S.C. 365(d)(4). See Appendix B for full text of this motion.

Bankruptcy Judge T. H. Kingsmill, Jr. signed an order dated August 18, 1987 setting a hearing on McGee's motion for August 26, 1987. See Appendix C for full text of that order.

On August 27, 1987 Judge Kingsmill signed a Minute Entry wherein he found that "under the provisions of the code" McGee's was entitled to the relief sought in its Motion to Surrender Leasehold Premises to Landlord. This Minute Entry ordered the debtor to surrender the premises to McGee's in five days. See Appendix D for full text of this order.

Additionally on August 27, 1987 Judge Kingsmill signed an order in the *LaStrada* matter stating:

> IT IS ORDERED that the lease between Bobbie McGee's, Inc. and LaStrada Ristorante, Inc. be deemed rejected by debtor.

See Appendix E for full text of this order.

—o—

II. ARGUMENT

Freshmen law students are well aware that stare decisis means like facts will receive like treatment. *Flowers v. United States*, 764 F.2d 759, 761 (11th Cir. 1985), *quoting County of Monroe, Florida v. U.S. Dept. of Labor*, 690 F.2d 1359, 1363 (11th Cir. 1982).

It is a firm rule of the Fifth Circuit that precedent cannot be disregarded. *Wilson v. Taylor*, 658 F.2d 1021 (5th Cir. 1981). This court has recognized that the doctrine of stare decisis "demands respect" in a society governed by the rule of law. *City of Akron v. Akron Center for Reprod. Health*, 103 S.Ct. 2481, 2487 (1983).

Despite these firm principles we note two significant anomolies:

First, the Fifth Circuit has failed to recognize the precedent and rules of law set forth in *In re: Tonry*, 724 F.2d 476 (5th Cir. 1984) (a lease or executory contract comes into the bankruptcy estate only when assumed by the trustee) and *In re Lovitt*, 757 F.2d 1035 (9th Cir.), *cert. denied*, 106 S.Ct. 145 (1985) (a bankruptcy court is without jurisdiction to enter an order confirming a trustee

sale of a lease rejected by operation of law; statutory presumption of rejection by trustee's non-action is conclusive).

Second, the bankruptcy court is not applying the rule of 11 U.S.C. 365(d)(4) consistently when presented with the same facts, i.e. failure of a debtor or trustee to assume or reject a lease within 60 days. It is particularly noteworthy that the bankruptcy court seemed to rely on the fact that the trustee paid rent as its primary basis for ruling in this case that the lease was not rejected. *See* Petition for Writ of Certiorari, pp. A-30 through A-34. In *In re: LaStrada, Inc.* (*see* Appendices) the same court even ordered the payment of rent only 20 days before it ruled the lease was rejected by operation of 11 U.S.C. 365(d)(4).

Petitioner cannot help but wonder whether the justice dispensed in the bankruptcy court below depends on who you are.

———o———

III. CONCLUSION

For the foregoing reasons and those contained in the Petition for Writ of Certiorari filed herein on July 1, 1987 a writ of certiorari should issue to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

DON M. RICHARD
Counsel of Record

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APPENDIX A

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF LOUISIANA

RE: LASTRADA RESTORANTE, INC.	)	NUMBER 87-02611-BKC-THK
DEBTOR	)	CHAPTER 11

ORDER

(Filed Aug. 11, 1987)

Present: Roy E. Blossman
Attorney for Federal Savings and Loan Insurance Corporation, as Receiver for New Orleans Federal

Richie Arnoult
Bobbie McGee's, Inc.

Not Present: John Keys
Attorney for Debtor

Considering the pleadings and argument of counsel regarding Bobbie McGee's Inc.'s Motion For Payment of Administrative Claim;

IT IS ORDERED that Lastrada Restorante, Inc. pay Four Thousand Four Hundred and No/100 ($4,400.00) to the Federal Savings and Loan Insurance Corporation, as receiver for New Orleans Federal, for the rent for the month of July, 1987.

New Orleans, Louisiana, this 7th day of August, 1987.

/s/ T. H. Kingsmill, Jr.
UNITED STATES
BANKRUPTCY JUDGE

2367S

APPENDIX B

UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF LOUISIANA

IN RE BANKRUPTCY PETITION OF
LASTRADA RISTORANTE, INC.

CASE NO. 87-02611-BKC-THK

MOTION TO SURRENDER LEASEHOLD
PREMISES TO LANDLORD

(Filed Aug. 18, 1987)

Now into Court comes Bobbie McGee's, Inc., through its undersigned counsel, who respectfully avers that mover is entitled to have the leasehold premises of LaStrada Ristorante, located at 3528-18th Street in Metairie, Louisiana surrendered to it by the debtor who has failed to comply with the provisions of Title 11 § 365(d)(4) in the following respects:

1.

On or about June 15, 1987, the debtor filed for relief under Chapter 11 of the Bankruptcy Code and that 60 days have elapsed since the order granting relief was entered.

2.

Mover is the landlord of an unexpired lease of non-resident real property under which the debtor is the lessee, namely LaStrada Ristorante.

3.

Mover has failed to accept or reject the said lease in compliance with Title 11, § 365(d)(4) of the Bankruptcy Code and therefore, the lease is deemed rejected and mover

is entitled to an order requiring the debtor to immdiately surrender the said non-resident real property to the lessor.

4.

Debtor has at all times since the filing of the bankruptcy petition herein failed to pay the rent as required by the lease which is filed of record herein.

5.

Debtor has failed to obtain an order granting him an extension of time in which to accept or reject the said lease and, in fact, debtor has taken no action at all within the time periods allowed by law to preserve his rights to occupy the said premises.

Respectfully submitted,

/s/ Douglas A. Allen, Jr.
DOUGLAS A. ALLEN, JR.
Attorney for Mover
3900 River Road, Suite 9
Jefferson, LA 70121
Telephone: 831-4038

VERIFICATION

PARISH OF JEFFERSON
STATE OF LOUISIANA

BEFORE ME, the undersigned authority, personally came and appeared Richard E. Arnoult, who after being duly sworn did state that the facts and allegations contained in the foregoing are true and correct to the best of his knowledge and belief.

/s/ Richard E. Arnoult
RICHARD E. ARNOULT
President—Bobbie McGee's
Inc.

Sworn to and subscribed before me this
18th day of August, 1987
/s/ Douglas A. Allen, Jr.,
DOUGLAS A. ALLEN, JR.
Notary Public

CERTIFICATE OF SERVICE

I do hereby certify that I have on this 18th day of Aug., 1987, served a .....(illegibile) ....

/s/ Douglas A. Allen, Jr.
DOUGLAS A. ALLEN, JR.,
Notary Public

APPENDIX C

UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF LOUISIANA

IN THE BANKRUPTCY PETITION OF
LASTRADA RISTORANTE, INC.

CASE NO. 87-02611-BKC-THK

ORDER

Considering the foregoing verified motion.

IT IS HEREBY ORDERED that this matter be heard on the 26th day of August, 1987 at 10:30 o'clock a.m. New Orleans, Louisiana, this 18th day of August, 1987.

/s/ T. H. Kingsmill, Jr.
U.S. BANKRUPTCY JUDGE

APPENDIX D

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF LOUISIANA

MINUTE ENTRY
KINGSMILL, J.
AUGUST 26, 1987

NUMBER
87-02611-K

IN THE MATTER OF
LASTRADA RISTORANTE, INC., DEBTOR

REORGANIZATION
CHAPTER 11

(Filed Aug. 31, 1987)

This matter came before the Court this date as a hearing on the motion of Bobbie McGee's Inc. to surrender leasehold premises to landlord.

PRESENT: Douglas Allen
Attorney for Bobbie McGee's

John T. Keys, Jr.
Attorney for Debtor

Counsel for the debtor advised the Court that the rents have been assigned to FSLIC, which FSLIC would be the proper party to bring said motion. Counsel for Bobbie McGee's advised the Court he has spoken with counsel for FSLIC who has no opposition to said motion. The Court recessed and later convened at which time Roy E. Blossman, counsel for FSLIC, appeared and concurred with counsel for Bobbie McGee's. Considering further statements of counsel and the record herein,

The Court, under the provisions of the code, believes the lessor is entitled to relief. Accordingly,

IT IS ORDERED that Lastrada Ristorante, Inc., debtor herein, surrender said premises to Bobbie M Gee's and FSLIC no later than SEPTEMBER 1, 1987.

New Orleans, Louisiana, August 27, 1987.

/s/ T. H. Kingsmill, Jr.
U. S. BANKRUPTCY JUDGE

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8/28/87—joc

APPENDIX E

UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF LOUISIANA

RE: LASTRADA RISTORANTE, INC.	)	NUMBER
	)	87-02611-BKC-THK
DEBTOR	)	
	)	CHAPTER 11

ORDER

(Filed Aug. 31, 1987)

Present: Roy E. Blossman
Attorney for Federal Savings and Loan
Insurance Corporation, as Receiver for
New Orleans Federal

Douglas A. Allen, Jr.
Attorney for Bobbie McGee's, Inc.

John Keys
Attorney for Debtor

Considering the pleadings and argument of counsel regarding Bobbie McGee's, Inc's Motion

For Surrender of Leasehold Premises;

IT IS ORDERED that the lease by and between Bobbie McGee's Inc. and LaStrada Ristorante, Inc. be deemed rejected by the debtor.

IT IS FURTHER ORDERED that LaStrada Ristorante, Inc. vacate and surrender the premises at 3528 18th Street, Metairie, Louisiana, within five (5) days of August 26, 1987.

New Orleans, Louisiana, this 27 day of August, 1987.

/s/ T. H. Kingsmill, Jr.
UNITED STATES
BANKRUPTCY JUDGE

2367S